90-1603

Supreme Court, U.S.
FILED
FEB 2 1991
OFFICE OF THE CLERK

NO. _____

SUPREME COURT OF THE
UNITED STATES
October Term, 1990

==========

BARRY MASSEY,

Petitioner,

-vs-

STATE OF WASHINGTON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the Court of Appeals of
the State of Washington
Division II

PETITION FOR WRIT OF CERTIORARI

Charles J. Herrmann
Counsel for Petitioner
HERRMANN & ASSOCIATES &
LAW OFFICES OF JAMES C. BUCKLEY
1535 Tacoma Avenue South
Tacoma, WA 98402
(206) 627-8142

December 26, 1990

I. QUESTIONS PRESENTED FOR REVIEW

1. Whether a life imprisonment sentence without the possibility of parole constitutes cruel and unusual punishment for a defendant who was only 13 years old when the offense occurred?

2. Whether the State juvenile court abused its discretion by declining juvenile court jurisdiction over the 13 year old petitioner.

3. Whether petitioner waived his Fifth Amendment right prior to making incriminating statements to law enforcement?

4. Whether petitioner was denied a fair trial by the trial court's refusal to allow petitioner's co-defendant's confession into evidence?

5. Whether petitioner's Fifth Amendment privilege against self-incrimination was violated by the trial court's order compelling petitioner to submit to questioning by the State's psychologist?

TABLE OF CONTENTS

Page

I. QUESTIONS PRESENTED FOR REVIEW . i

GROUNDS ON WHICH THIS COURT'S JURISDICTION IS INVOKED v

CONSTITUTIONAL PROVISIONS INVOLVED . v

I. STATEMENT OF THE CASE 1

A. PROCEEDINGS AND PROCEDURES IN STATE COURTS 1

B. PRIOR ACTION ON ISSUES BY STATE COURTS 2

C. STATEMENT OF FACTS 2

III. ARGUMENT WHY WRIT OF CERTIORARI SHOULD BE GRANTED 5

A. LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT WHEN IMPOSED UPON A DEFENDANT WHO WAS ONLY 13 YEARS OLD WITH A MENTAL AGE OF 9.9 YEARS WHEN THE OFFENSE OCCURRED. 6

B. WAIVER OF JUVENILE COURT JURISDICTION OVER PETITIONER VIOLATED DUE PROCESS. . . . 14

C. PETITIONER WAS DENIED HIS FIFTH AND SIXTH AMENDMENT RIGHTS AGAINST SELF-INCRIMINATION AND TO COUNSEL. 17

D. PETITIONER WAS DENIED HIS RIGHT TO PRESENT A DEFENSE. . . . 28

E. PETITIONER WAS DENIED HIS FIFTH AMENDMENT RIGHTS AND THE RIGHT TO THE ASSISTANCE OF LEGAL COUNSEL. 33

IV. CONCLUSION 36

APPENDIX 38

1. ORDER of the Supreme Court of the State of Washington: State of Washington, Respondent vs. Barry Massey, Petitioner, No. 57346-8, filed October 4, 1990 App. A

2. UNPUBLISHED OPINION of the Court of Appeals of the State of Washington, Division Two: State of Washington, Respondent v. Barry Massey, Appellant, No. 12187-5-II, filed June 6, 1990 App. B

3. JUDGMENT AND SENTENCE of the Superior Court of the State of Washington for Pierce County: State of Washington, Plaintiff vs. Barry C. Massey, Defendant, No. 87-1-01354-7, filed August 5, 1988 App. C

4. ORDER DECLINING JURISDICTION OF JUVENILE COURT of the Superior Court of the State of Washington, Juvenile Court for Pierce County: State of Washington, Plaintiff vs. Barry Massey, Defendant, No. 182682 R010 and 182682 R020, filed April 15, 1987 App. D
. 39

TABLE OF AUTHORITIES

Table of Cases Page

Chambers v. Mississippi, 410 U.S. 284, 302, 93 S. Ct. 1038, 1049, 35 L. Ed. 2d 297, 312 (1973) 30

Cooper v. Griffin, 455 F.2d 1142 (5th Cir. 1972) 21

Estelle v. Smith, 451 U.S. 454, 68 L. Ed. 2d. 359, 01 S. Ct. 1866 (1981), *cert. denied*, 465 U.S. 1005, 104 S.Ct. 997 . . . . . 34, 35

Fare v. Michael C., 442 U.S. 707, 61 L. Ed. 2d 197, 99 S. Ct. 2560 (1979) 19, 20

Gallegos v. Colorado, 370 U.S. 49, 54 (1961) 22

Haley v. Ohio, 332 U.S. 596 (1948) . 20

In re Carlo, 225 A.2d 110, 48 N.J. 224 (N.J. 1966) 23

In re Garland, 160 So.2d 340, 230 Ala 165 (La. Ct. App. 1964) 23

In Re Gault, 387 U.S. 1 (1967) . . . 18

In re Gregory, 224 N.E.2d 102, 19 N.Y. 55, 227 N.Y.S.2d 675 (N.Y. 1966) 23

In re Kave, 760 F.2d 343 (1st Cir. 1985) 35

Kent v. United States, 383 U.S. 541, 86 S.Ct. 1045, 16 L. Ed. 2d 84 (1966) . 14, 16, 17

Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966) . . 19, 21, 22, 27

Robinson v. California, 370 U.S. 660 (1962) 7

See State v. Grisby, 97 Wn.2d 493, 498, 647 P.2d 6, (1982), *cert. denied* 103 S. Ct. 1205, 459 U.S. 1211 8

State v. Forrester, 21 Wn. App. 855, 871, 587 P.2d 179 (1978) 8

State v. Huson, 73 Wn.2d 660, 440 P.2d 192 (1968), *cert. denied*, 393 U.S. 1096, 89 S. Ct. 886, 21 L. Ed. 2d 787 (1969) . . 34

Thompson v. Oklahoma, 487 U.S. 815, 101 L. Ed. 2d 702, 108 S. Ct. 2687 (1988) 7, 8, 12

Trop v. Dulles, 3456 U.S. 86, 101 (1958) 11

U. S. v. Satterfield, 572 F.2d 687 (9th Cir. 1978), *cert. denied* 439 U.S. 840 32

United States v. Alvarez, 584 F.2d 694 (5th Cir. 1978) 32

United States v. Barnett, 539 F.2d 244 (1st Cir. 1976) 32

United States v. C'Heste, 640 F.2d 693 (5th Cir. 1981) 33

United States v. Cohen, 530 F.2d 43 (5th Cir. 1976), *cert. denied* 429 U.S. 885 35

United States v. Halbert, 712 F.2d 388, 390 (9th Cir. 1983) 34

United States v. Hayes, 590 F.2d 309 (9th Cir. 1979) 14

United States v. Thomas, 571 F.2d 285 (5th Cir. 1978) 32

United States v. White, 668 F.2d 409 (C.A.N.D. 1982) 18

Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 1923, 18 L. Ed. 2d 1019, 1028 (1967) 28, 29

West v. United States, 399 F.2d 467, (5th Cir. 1968), *cert. denied*, 393 U.S. 1102 23

Constitutional Provisions

Eighth Amendment 6, 7, 11, 13

Fifth Amendment . . 18-20, 27, 31, 34-36

Sixth Amendment . . . 18, 27, 28, 30, 33

Statutes

RCW 13.40.110(3) 16

Regulations and Rules

ER 804 . . . . . 31, 32

Rule 13 v

Supreme Court Rule 10 5

Other Authority

Ferguson & Douglas, "A Study of Juvenile Waiver", 7 San Diego L.Rev. 39 (1980) 22

GROUNDS ON WHICH THIS COURT'S JURISDICTION IS INVOKED

This is a petition for a Writ of Certiorari for a review of the Washington State Court of Appeals' Decision affirming defendant's conviction of aggravated murder in the first degree. On October 5, 1990, a petition for a review of the Court of Appeals' decision was denied by the Supreme Court of the State of Washington, a State court of last resort. Rule 13 provides a petition for certiorari must be filed within 90 days after entry of an order denying discretionary review by a state court of last resort. The ninety day period lapses on January 3, 1991. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

1. Fifth Amendment:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases

arising in the land or naval forces, or in the malitia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

2. Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. amend. VI.

3. Eighth Amendment:

Excessive bail shall not be required, nor excessive fines

imposed, nor cruel and unusual punishments inflicted.

U. S. Const. amend. VIII.

II. STATEMENT OF THE CASE

This is a petition for a writ of certiorari for review of the decision of the Court of Appeals, State of Washington, Division II, affirming defendant's criminal conviction of aggravated first degree murder. The decision was filed on June 6, 1990. Appendix B.

A. PROCEEDINGS AND PROCEDURES IN STATE COURTS

On January 12, 1987, a criminal Information was filed in juvenile court charging then 13 year old Barry Massey and 15 year old Michael Harris with aggravated murder in the first degree. The charge alleges, in part, that on or about January 10, 1987, the defendants, with premeditated intent, in the course of a robbery, caused the death of Paul Wang.

On April 13, 1987, the juvenile court entered an order declining its jurisdiction over petitioner. On June 24,

1988, petitioner was tried separately and convicted of aggravated first degree murder by a jury. On August 3, 1988, petitioner was sentenced to life imprisonment without the possibility of parole. On June 6, 1990, the Court of Appeals affirmed petitioner's conviction. See Appendix C.

On October 5, 1990, the Supreme Court of the State of Washington denied petitioner's petition for discretionary review. See Appendix A.

B. PRIOR ACTION ON ISSUES BY STATE COURTS

All issues raised herein were raised in the state's trial and appellate courts, including the state supreme court. See Appendix.

C. STATEMENT OF FACTS

On January 10, 1987, at approximately 2:30 p.m., Paul Wang, owner of the Steilacoom Marina in Tacoma, Washington,

was found dead at the marina. RP 86, 108. The cash register had been removed and placed on the counter. RP 188.

A witness informed the police she had seen a white male and female running from the area approximately a half hour earlier. RP 355, Vol. I, 39. An officer was deployed and observed a car and a pickup truck in the area. RP 346. Three individuals were in the truck, a white male approximately 20 years old, and two black minors, 13 year old Barry Massey and 15 year old Michael Harris. RP 348, Vol. I, 27. While waiting at the location a canine unit came out of the woods and began circling the patrol car. RP 354. It was later determined the homicide suspects were two black juveniles. RP 355-56. Massey's shoe prints were examined and he was placed under arrest and given his Miranda warnings. RP 357.

Massey was taken to the police

station where he gave a recorded statement indicating he had shot and stabbed Wang, RP 567, and that Harris was with him. RP 567. Harris also gave a recorded confession, a part of which states "after I shot the dude". Also, a blood spot consistent with the victim's blood type was found on Harris' pant leg. RP 458-59.

While at a juvenile facility awaiting a decline hearing, Harris confessed to shooting and stabbing Wang and said Massey "was just there". RP 702. Massey subsequently recanted his confession. RP Vol. III, 382. Harris' confession was excluded at Massey's trial.

Massey raised as a defense his lack of capacity to premeditate or form an intent, which were elements of the crime charged. Prior to trial, the trial court entered an order compelling Massey to submit to psychological tests by a psychologist selected by the state.

Harris had four prior felony and three misdemeanor convictions, including an assault conviction, RP Vol. III, 419-420. He had also escaped from juvenile hall on one prior occasion. RP Vol. III, 421. This was Massey's first criminal charge. RP Vol. II, 268-69.

Juvenile court jurisdiction over Massey was declined. He was subsequently convicted of aggravated first degree murder and sentenced to life imprisonment without the possibility of parole.

III. ARGUMENT WHY WRIT OF CERTIORARI SHOULD BE GRANTED

Supreme Court Rule 10 provides the following grounds for granting a review on Writ of Certiorari:

> "(b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.
>
> (c) When a state court or a United States court of appeals has decided an important

> question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court."

This case is appropriate for review under both provisions. The Court of Appeals Decision which affirmed petitioner's conviction and sentence of life imprisonment without the possibility of parole is in conflict with several decisions of the United States court of appeals and this Court. The relevant decisions and argument concerning the issues follows.

A. LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT WHEN IMPOSED UPON A DEFENDANT WHO WAS ONLY 13 YEARS OLD WITH A MENTAL AGE OF 9.9 YEARS WHEN THE OFFENSE OCCURRED.

The Eighth Amendment provides:

> "Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishment inflicted."

U.S. Const. amend. VIII. The Eighth Amendment prohibition against cruel and unusual punishment is binding on the states as well as the federal government. *See, e.g., Robinson v. California,* 370 U.S. 660 (1962).

Recently this Court held imposition of the death penalty upon a defendant who was less than 16 years old at the time of the offense was cruel and unusual punishment in violation of the Eighth Amendment. *Thompson v. Oklahoma,* 487 U.S. 815, 101 L. Ed. 2d 702, 108 S. Ct. 2687 (1988). However, counsel's research indicates the case at bar is one of first impression. We have found no other case where this Court or any court in any state has been asked to decide whether a sentence of life imprisonment upon a mentally deficient defendant who was only 13 years old when the offense occurred constitutes cruel and unusual punishment.

The State of Washington's courts have held a life sentence without the possibility of parole imposed upon an adult does not constitute cruel and unusual punishment. *See State v. Grisby*, 97 Wn.2d 493, 498, 647 P.2d 6, (1982), *cert. denied* 103 S. Ct. 1205, 459 U.S. 1211; *State v. Forrester*, 21 Wn. App. 855, 871, 587 P.2d 179 (1978). However, this is the first such case involving a 13 year old juvenile.

In *Thompson v. Oklahoma, supra*, this Court relied heavily upon Thompson's age when the offense occurred in holding his death penalty as cruel and unusual punishment. Thompson was 15 years old when he actively participated in the brutal murder of his former brother-in-law. *Id.* On the issue of his youth, the Court indicated at 822-23:

> ". . . in confronting the question whether the youth of the defendant--more specifically, the fact that he

> was less than 16 years old at the time of his offense--is a sufficient reason for denying the State the power to sentence him to death, we first review relevant legislative enactments, then refer to jury determinations, and finally explain why these indicators of contemporary standards of decency confirm our judgment that such a young person is not capable of acting with the degree of culpability that can justify the ultimate penalty."

In explaining the unlikely and unusual event of a death penalty being imposed on an offender less than 16 years old, the court observed at 832-33:

> "Department of Justice statistics indicate that during the years 1982 through 1986 an average of over 16,000 persons were arrested for willful criminal homicide (murder and non-negligent manslaughter) each year. Of that group of 82,094 persons, 1,393 were sentenced to death. Only 5 of them, including the petitioner in this case, were less than 16 years old at the time of the offense. Statistics of this kind can, of course, be interpreted in different ways, but they do suggest that these five young offenders have received sentences that are 'cruel and unusual in the same way that

> being struck by lightning is cruel and unusual'." *Furman v. Georgia*, 408 U.S. at 309, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (Stewart, J., concurring).

The court made it clear that even where state statutes do not provide so, there is a minimum age at which imposition of the death penalty may not be imposed:

> "One might argue on the basis of this body of legislation that there is no chronological age at which the imposition of the death penalty is unconstitutional and that our current standards of decency would still tolerate the execution of 10-year-old children. We think it self-evident that such an argument is unacceptable; . . ."

487 U.S. at 827-28.

The Court concluded by holding:

> "Our task today, . . . is to decide the case before us; we do so by concluding that the Eighth and Fourteenth Amendments prohibit the execution of a person who was under 16 years of age at the time of his or her offense."

487 U.S. at 838.

The task of defining the contours or

limits of the Eighth Amendment prohibition against imposition of cruel and unusual punishment is passed from generation to generation of judges. *Id.* In deciding the issue, the Court must be guided by the "evolving standards of decency that mark the progress of a maturing society". *Trop v. Dulles,* 3456 U.S. 86, 101 (1958).

In the case at bar, petitioner was 13 years old when the offense occurred with no prior criminal convictions, and with various mental deficiencies. The psychologists testified his mental age was 9.9 years. RP Vol. III, 359-60. He had a borderline I.Q. of 77 and suffered from a learning disability. RP Vol. III, 339, 381. He functioned at the third grade level in reading, spelling and arithmetic. RP Vol. III, 361-64. He also was found to be passive, cōnfirming and accommodating. RP Vol. III, 367, 380-81.

The Washington appellate court held

age was not a consideration in determining whether a life sentence without the possibility of parole was a cruel and unusual punishment as the same applies to minors. The Court stated:

> "Massey argues that his sentence of life imprisonment without the possibility of parole constitutes cruel and unusual punishment when applied to a 13 year old. The test is whether in view of contemporary standards of elemental decency, the punishment is of such disproportionate character to the offense as to shock the general conscience and violate principles of fundamental fairness. *Coker v. Georgia*, 433 U.S. 584, 53 L. Ed. 2d 982, 97 S. Ct. 2861 (1977). That test does not embody an element or consideration of the defendant's age, only a balance between the crime and the sentence imposed. Therefcre, there is no cause to create a distinction between a juvenile and an adult who are sentenced to life without parole for first degree aggravated murder."

State v. Massey, Court of Appeals, Div. II, No. 12187-5-II, page 13-14. However, in *Thompson v. Oklahoma, supra*, this Court

specifically considered age in deciding whether the imposition of the death penalty on a youthful offender who was less than 16 years old when the offense occurred violated the Eighth Amendment:

> "It is generally agreed 'that punishment should be directly related to the personal culpability of the criminal defendant.'" (citation omitted). "There is also broad agreement on the proposition that adolescents as a class are less mature and responsible than adults. We stressed this difference in explaining the importance of treating the defendant's youth as a mitigating factor in capital cases:
>
> > 'But youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage.. . .'"

487 U.S. at 834.

We submit it is cruel and unusual punishment in violation of the Eighth Amendment to impose a life sentence

without the possibility of parole upon a 13 year old offender who suffered from several mental deficiencies at the time of the offense. The interest of justice is not served by imposing such an unusual and cruel sentence. One cannot possibly know with any degree of reasonable probability that youth of such tender age cannot be rehabilitated.

B. WAIVER OF JUVENILE COURT JURISDICTION OVER PETITIONER VIOLATED DUE PROCESS.

The decision to transfer a juvenile for adult prosecution is within the sound discretion of the juvenile court. *Kent v. United States,* 383 U.S. 541, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966); *United States v. Hayes,* 590 F.2d 309 (9th Cir. 1979). However, the court's discretion has been uniquely limited by this Court's holding in *Kent v. United States, supra.* The *Kent* court set forth eight "determinative factors" to be considered

by a juvenile court when deciding whether to waive its jurisdiction over a juvenile. 383 U.S. at 566-67. The factors generally serve as a balancing process between rehabilitation or best interest of the juvenile and the protection of the public. *Id.*

No one factor is controlling and not all the factors need be present. 383 U.S. at 567-68. However, the factors used must be supported by evidence. *Id.* at 383 U.S. at 555, 557.

The waiver order must also be accompanied by a statement of reasons for the waiver decision of sufficient specificity to permit meaningful review:

> ". . . [I]t must set forth the basis for the order with sufficient specificity to permit meaningful review."

Kent v. United States, supra, 383 U..S. at 561. In other words, the waiver hearing must measure up to the essentials of due

process and fair treatment. *Id.* 383 U.S. at 562.

In the instant case, the juvenile court's order simply stated in conclusionary terms the eight "determinative factors" of *Kent*. However, the court order failed to list adequate or any reasons for the waiver except for the conclusions given. The waiver order fails to comply with the *Kent* requirement of "sufficient specificity".

Furthermore, a Washington state statute requires the juvenile court's decision to waive jurisdiction:

> ". . . shall be supported by relevant facts and opinions produced at the hearing."

RCW 13.40.110(3).

In the instant case, there were no facts, evidence, witnesses or opinions submitted in support of the waiver. RP Vol. 1-4. The court ignored the opinions, recommendations and testimony of the

experts and lay witnesses in the case. All the experts recommended juvenile court jurisdiction should not be waived and testified the child was treatable within the juvenile system and the protection of society could be met by retaining the child in juvenile court. RP Vol. 4, 498-99, 580-83.

Waiver decisions are required to be supported by evidence. *Kent v. United States, supra.* Other than for the offense, there was no evidence submitted in support of the waiver. RP Vol. 1-4.

We submit petitioner was denied due process of law and fair treatment.

C. PETITIONER WAS DENIED HIS FIFTH AND SIXTH AMENDMENT RIGHTS AGAINST SELF-INCRIMINATION AND TO COUNSEL.

Prior to and shortly after his arrest, Massey was interrogated by the police without the presence of any friend, guardian, parent or attorney. RP Vol. I,

90-91, 101. Throughout the interrogation the police played on Massey's desire to talk to "friendly" adults. RP 361-62, 581.

Juveniles are accorded both Fifth and Sixth Amendment rights. *In Re Gault*, 387 U.S. 1 (1967); *United States v. White*, 668 F.2d 409 (C.A.N.D. 1982). The Fifth Amendment provides: ". . . nor shall [any person] be compelled in any criminal case to be a witness against himself, . . .". The Sixth Amendment provides: "in all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." These provisions do not specifically provide that before being questioned, a person must be advised of these rights and warned of the use that can be made of his statements. However, this Court has held such advice and warning are necessary at the interrogation stage of a prosecution

in order to enable a person to enjoy the benefits of the rights given. *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966). The right to remain silent and to advice of counsel may be waived. However, in order for a waiver to be valid it must be voluntarily, knowingly and intelligently made. *Fare v. Michael C.*, 442 U.S. 707, 61 L. Ed. 2d 197, 99 S. Ct. 2560 (1979). In determining whether a juvenile has voluntarily and knowingly waived his *Miranda* rights prior to giving an incriminating statement to the police, the Court must review the totality of the circumstances:

> "The totality approach permits -- indeed, it mandates -- inquiry into all the circumstances surrounding the interrogation. This includes evaluation of the juvenile's age, experience, education, background and intelligence, and into whether he had the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the

consequences of waiving those rights.

Fare v. Michael C., supra, at 725.

The Court in *Fare* delineated the following factors to be considered in determining whether a valid waiver has been made: age, experience, education, background, intelligence, and the capacity to understand the warnings, the nature of the Fifth Amendment rights, and the consequences of waiving those rights. *Id.* at 725. No particular factor is conclusive of an invalid waiver, however, age is an important factor. *Haley v. Ohio,* 332 U.S. 596 (1948) (fifteen year old is an easy victim of the law and cannot be judged by exacting standards of maturity. "That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens." *Id.* at 599).

A juvenile cannot knowingly and

intelligently waive a right if he does not have the mental capacity to do so. *Cooper v. Griffin,* 455 F.2d 1142 (5th Cir. 1972) (fifteen and sixteen year olds accused of armed robbery, taken into custody and given *Miranda* warnings, had no previous experience with the criminal process and low I.Q. (61 and 67)), were incapable of making knowing and intelligent waiver of their rights. The consideration of a juvenile's "experience" includes those experiences that would indicate a juvenile's level of maturity, but, more importantly, whether a juvenile has prior convictions or previous dealings with law enforcement. This factor weighs heavily on the determination of a knowing and intelligent waiver of rights and voluntary consent to interrogation. *Id.*

In addition, this Court has previously recognized the particular susceptibility of juveniles to subtle and

coercive interrogation tactics:

> "The prosecution says that the boy was advised of his right to counsel, but that he did not ask either for a lawyer or for his parents. But a 14 year old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police. That is to say, we deal with a person who is not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded and who is unable to know how to protect his own interests or how to get the benefits of his constitutional rights."

Gallegos v. Colorado, 370 U.S. 49, 54 (1961).

In one empirical study of juvenile waiver, the authors found that when asked if they felt it was "better" to talk to the police, 74% of the delinquents and 93% of the other juveniles who were tested and voluntarily waived their rights, did not understand at least one of the elements of the *Miranda* warnings. Ferguson & Douglas, "A Study of Juvenile Waiver", 7 San Diego

L.Rev. 39 (1980). Because of pressure and susceptibility to the interrogation process, juvenile confessions may be unreliable. The Fifth Circuit in *West v. United States,* 399 F.2d 467, (5th Cir. 1968), *cert. denied,* 393 U.S. 1102, recognized this by including within the totality of the circumstances test consideration of whether the out-of-court statement was recanted at a later date. *See, e.g., In re Garland,* 160 So.2d 340, 230 Ala 165 (La. Ct. App. 1964) (fifteen year old falsely confessed to a burglary he did not commit); *In re Carlo,* 225 A.2d 110, 48 N.J. 224 (N.J. 1966) (false confessions to beating and sexual assault of murder victim by 13 and 15 year old); *In re Gregory,* 224 N.E.2d 102, 19 N.Y. 55, 227 N.Y.S.2d 675 (N.Y. 1966) (twelve year old falsely confessed to murder committed when one of them had been institutionalized in a mental hospital).

In the instant case, the petitioner was only 13 years old at the time of the offense. RP Vol. I, 27. He had a borderline I.Q. of 77, and a learning disability. RP Vol. III, 359, 381. Massey had a mental age of a child of 9.9 years. RP Vol. III, 359-60. He had a problem concentrating, and was functioning at the third grade level in reading, spelling and arithmetic. RP Vol. III, 361-69.

In addition, Massey was unable to do simple tasks like counting backwards by three; naming the months backwards. RP Vol. III, 372-73. He also had short and long-term memory problems. RP Vol. III, 373, 359. The psychologist who administered psychological tests to him had to use special art skills to communicate with him in a manner he could comprehend. RP Vol. III, 371-72. He was found to be passive, conforming, naive and

a slow learner. RP Vol. III, 380-81, 367. The psychologist found Massey would sign a document if asked to do so whether he understood it or not. RP Vol. III, 367-68. Also, during questioning it appeared to the police officer Massey was willing to do whatever was asked of him. RP Vol. I, 44-45. This also was consistent with the psychologist's findings. RP Vol. III, 367.

During the interrogation process, Massey was subjected to coercion and repeated statements not only encouraging him to talk, but acknowledging the difficulty in talking and the interrogator's appreciation of his responses. RP 581-83. In the twenty-eight minute interrogation, such statements were repeated at least six times:

> (1) Well that has a lot to do on whether you tell us the truth. If you're straight with me and tell me the truth it's

> usually viewed by the judge that at least you were concerned about what you did. I think you want to tell me what really happened, . . . but I want you to understand that if you tell me the truth you will feel a lot better about it too . . . (2) Why don't you tell me what happened, and this time, see I know you weren't telling the whole story. So I need you to tell me what really happened, I know you'll feel better when you've done it. . . . (3) I know it's hard and you're not feeling real good but you're helping us out a lot and I really appreciate that. . . . (4) I know that's a pretty hard thing to have inside you isn't it? . . . (5) You're doing real well, I appreciate what you're doing and I know it's real hard for you, I know you're not feeling real good about it but by telling us what happened, it's a lot better. . . . Like you said you already do feel a lot better don't you? . . . (6) I really appreciate you telling me the truth . . ., do you feel any better?

These coercive statements aided in extracting an inculpatory statement from Massey. However, the statement is unreliable. After the interrogation, Massey recanted the statements and denied

any involvement in the death of the victim. RP Vol. III, 382.

We submit Massey's out-of-court statements were inadmissible because the waiver of his *Miranda* rights was invalid under the totality-of-the-circumstances test. Massey did not knowingly and intelligently waive his Fifth and Sixth Amendment rights. Massey was 13 years old when charged, without the emotional and mental capacity to understand both the meaning of his rights and the consequences of waiving them. He had no prior experience with the police. He was particularly susceptible to the subtle coercion of "friendly" adults. Massey had a mental age of 9.9 years.

We submit Massey did not make a knowing and intelligent waiver of his rights. The statement should have been suppressed.

D. PETITIONER WAS DENIED HIS RIGHT TO PRESENT A DEFENSE.

The right of an accused to present witnesses on his behalf and present his version of the facts to a jury is guaranteed by the Sixth Amendment to the United States constitution. Moreover, it is a fundamental component of due process of law. The Sixth Amendment guarantees that "in all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor. . . ". While the right to compulsory process is phrased specifically in terms of securing the testimony of third parties, the provision has been interpreted broadly to encompass the fundamental right to present a defense. It encompasses the right of a defendant to have witnesses testify on the defendant's behalf.

This constitutional right was

recognized by this Court in *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 1923, 18 L. Ed. 2d 1019, 1028 (1967), wherein the Court stated:

> "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecutor's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law."

In *Washington*, the court reversed the defendant's conviction because the state had arbitrarily denied the defendant the right to call a witness "who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to

the defense." *Id.* at 23, 87 S. Ct. at 1925. In concluding that the defendant's Sixth Amendment and due process rights had been violated, the Court reasoned that "the Framers of the constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use." *Id.* This Court has reiterated its position on compulsory process, stating that "few rights are more fundamental than that of an accused to present a witness in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S. Ct. 1038, 1049, 35 L. Ed. 2d 297, 312 (1973).

In the instant case, the defense offered the testimony of Melody Anderson, a friend of Massey's co-defendant, Michael Harris. RP 716. Ms. Anderson testified in an offer of proof, that Harris confessed to her that he killed the victim

and Massey was simply present and took no part in the homicide. RP 702. The court excluded the evidence on hearsay grounds.

Rule 804(b)(3) provides the following statement is not excluded by the hearsay rule if the declarant is unavailable as a witness:

> "A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability . . . that a reasonable man in his position would have not made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability . . .".

ER 804(b)(3).

During trial, co-defendant Harris was called as a witness by the defendant. RP 925. Harris exercised his Fifth Amendment right and refused to testify. RP 925. Thus, Harris was unavailable as a witness under ER 804. It is also apparent Harris' confession was such that it tended to

expose him to criminal liability. He confessed to murder. RP Vol. 702.

The third requirement is that corroborating circumstances must exist which indicates the statement is trustworthy. ER 804(b)(3); *United States v. Alvarez*, 584 F.2d 694 (5th Cir. 1978). Statements expressly exonerating the defendant are obviously relevant. *U. S. v. Satterfield*, 572 F.2d 687 (9th Cir. 1978), *cert. denied* 439 U.S. 840 (declarant stated defendant " was not his accomplice"); *United States v. Thomas*, 571 F.2d 285 (5th Cir. 1978) ("they ought to let Rowland Thomas go he didn't have anything to do with it").

Such statements are admissible if corroborating circumstances clearly indicate the trustworthiness of the statement. *United States v. Barnett*, 539 F.2d 244 (1st Cir. 1976); *United States v. Alvarez, supra*. Trustworthiness of the

statement is a matter for the court to decide in determining the sufficiency of the corroboration. *United States v. C'Heste*, 640 F.2d 693 (5th Cir. 1981).

Applying the trustworthiness test to the instant case, we submit Harris' confession was trustworthy and admissible. The proffered evidence adequately tested Harris' perception.

The statement's trustworthiness was substantiated and corroborated by Harris' tape-recorded statement to the police that he, Harris, "shot the dude,".

We submit petitioner was denied his Sixth Amendment right to present a defense by the court's exclusion of Harris' confession to Anderson.

E. PETITIONER WAS DENIED HIS FIFTH AMENDMENT RIGHTS AND THE RIGHT TO THE ASSISTANCE OF LEGAL COUNSEL.

Prior to trial, Massey was required, over objection, to respond to questioning

by a psychologist selected by the State. RP Vol. II, 315, 317. Massey was required to give incriminating statements or be subjected to contempt of court. RP Vol. II, 315, 317; RP Vol. VI, 549-50; RP Vol. VII, 606; CP 84-85.

It is settled a defendant who raises a diminished capacity defense gives up his Fifth Amendment rights against self-incrimination as to relevant testimony of an expert originally obtained by him. *Estelle v. Smith,* 451 U.S. 454, 68 L. Ed. 2d. 359, 101 S. Ct. 1866 (1981), *cert. denied,* 465 U.S. 1005, 104 S.Ct. 997; *United States v. Halbert,* 712 F.2d 388, 390 (9th Cir. 1983). The court has also held admissible a defendant's refusal to be examined by the State's psychiatrist. *State v. Huson,* 73 Wn.2d 660, 440 P.2d 192 (1968), *cert. denied,* 393 U.S. 1096, 89 S. Ct. 886, 21 L. Ed. 2d 787 (1969). However, an accused does not give up his

Fifth Amendment privileges against being compelled to give self-incriminating statements. *See, generally, United States v. Cohen,* 530 F.2d 43 (5th Cir. 1976), *cert. denied* 429 U.S. 885; *In re Kave,* 760 F.2d 343 (1st Cir. 1985).

In the instant case, Massey was compelled, over his objection, to give self-incriminating statements to an attorney selected by the state, who was also a psychologist, RP Vol. II, 317, 527-57. Petitioner's Fifth Amendment right was violated. *See, generally, Estelle v. Smith,* 451 U.S. 454, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981).

In addition, petitioner's rights to assistance of counsel were violated when he was compelled to give incriminating statements. The court's ruling provided defendant's attorney was to make defendant available for the examination notwithstanding defense counsel's advising

the court he did not want his client to answer any questions. RP Vol. II, 315-17; CP 84-85. Petitioner was without legal representation on the issue of whether he should or should not disregard the court's order and assert his Fifth Amendment rights.

Due process requires a defendant be afforded the assistance of legal counsel during all critical stages of a criminal prosecution. A denial of legal representation on the issue in question was a denial of effective legal representation.

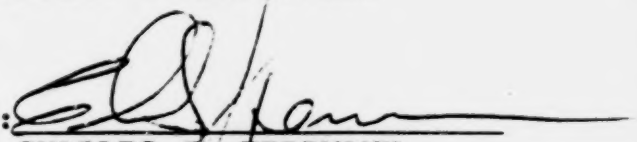
IV. CONCLUSION

Based upon the foregoing authorities and argument, the Court should grant the Writ of Certiorari and review the above-

captioned matter.

RESPECTFULLY SUBMITTED this 26 day of December, 1990.

HERRMANN & ASSOCIATES

BY: 

CHARLES J. HERRMANN
Counsel for Petitioner
WSBA #6173
1535 Tacoma Avenue South
Tacoma, WA 98402
(206) 627-8142

APPENDIX

1. ORDER of the Supreme Court of the State of Washington: State of Washington, Respondent vs. Barry Massey, Petitioner, No. 57346-8, filed October 4, 1990 App. A

2. UNPUBLISHED OPINION of the Court of Appeals of the State of Washington, Division Two: State of Washington, Respondent v. Barry Massey, Appellant, No. 12187-5-II, filed June 6, 1990 App. B

3. JUDGMENT AND SENTENCE of the Superior Court of the State of Washington for Pierce County: State of Washington, Plaintiff vs. Barry C. Massey, Defendant, No. 87-1-01354-7, filed August 5, 1988 App. C

4. ORDER DECLINING JURISDICTION OF JUVENILE COURT of the Superior Court of the State of Washington, Juvenile Court for Pierce County: State of Washington, Plaintiff vs. Barry

and 182682 R020, filed April 15, 1987 App. D

APPENDIX A

ORDER of the Supreme Court of the State of Washington: State of Washington, Respondent v. Barry Massey, Petitioner, No. 57346-8

This matter came before the Court on its October 4, 1990, En Banc Administrative Conference on Petition for Review. The Court having considered the Petition and the files herein;

Now, therefore, it is hereby

ORDERED:

That Petition for Review is denied. The Court of Appeals is directed to publish its opinion in this case.

DATED at Olympia, Washington this 4th day of October, 1990.

/s/ KEITH M. CALLOW
CHIEF JUSTICE

APPENDIX A

ORDER of the Supreme Court of the State of Washington: State of Washington, Respondent v. Barry Massey, Petitioner, No. 57346-8

This matter came before the Court on its October 4, 1990, En Banc Administrative Conference on Petition for Review. The Court having considered the Petition and the files herein;

Now, therefore, it is hereby

ORDERED:

That Petition for Review is denied. The Court of Appeals is directed to publish its opinion in this case.

DATED at Olympia, Washington this 4th day of October, 1990.

/s/ KEITH M. CALLOW
CHIEF JUSTICE

APPENDIX B

UNPUBLISHED OPINION of the Court of Appeals of the State of Washington, Division Two: State of Washington, Respondent v. Barry Massey, Appellant, No. 12187-5-II, filed June 6, 1990

WIELAND, J.* -- Barry Massey, a juvenile, appeals his aggravated first-degree murder conviction. He argues that the juvenile court should have retained jurisdiction; that he was unable to intelligently waive his Fifth and Sixth Amendment rights prior to confessing; and that the testimony concerning his partner's confession and other crimes was improperly excluded. He also argues that there was insufficient evidence to support a conviction and that life without possibility of parole constitutes cruel and unusual punishment. We affirm.

On January 10, 1987, Paul Wang, owner of the Steilacoom Marina, was found dead

---

*Judge Herbert E .Wieland is serving as a judge pro tempore of the Court of Appeals, pursuant to CAR 21(c).

at the marina. He had been shot twice, once in the stomach and head, and stabbed seven times. Witnesses informed the police officers that a white male and female were seen running from the area.

The Pierce County Sheriff's Department sent Officer Morrison to cover an escape route, with instructions to stop all traffic. She saw two vehicles leaving the area. Morrison realized that she could only stop one vehicle, and chose the closest, a truck. The truck contained a white 20-year-old male, and two black juveniles, 13-year-old Barry Massey and 15-year-old Michael Harris. After identifying the three occupants, Officer Morrison released Harris and the other person, but retained Massey, because he had been listed as a missing child, and placed him in her patrol car.

While waiting at her position, Officer Morrison observed a canine unit

coming out of the woods; the canine began circling her patrol car. She moved her vehicle and the canine again circled the car. Officer Andrews, the canine handler, informed Officer Morrison that the assailants had been described as two black juveniles.

The officers examined Massey's shoe prints and concluded that the shoe prints matched those left at the crime scene. Massey was then read his Miranda rights, including the juvenile advisement, and placed under arrest. After his arrest, Massey told Officer Morrison that he was not involved in the homicide, but that he and Harris found the victim dead and decided to rob the store. Massey later volunteered the same information to Officer Hall.

Massey was transferred to Officer Hall's patrol car and transported to the police station. At the station, Massey

was given his Miranda rights again. Massey waived his rights and then provided a recorded statement to Officer Hall indicating that he and Harris had committed the crime. During his statement, Massey said that he had never been "in juvenile" and asked if he was "going to jail for life." Massey also said they killed Wang because he could recognize Harris's face in a "mug book."

Harris was later arrested, and when taken back to the crime scene he provided the location of the gun used to perpetrate the murder.

The State charged Massey and Harris with aggravated first degree murder, first-degree burglary, and first-degree robbery.[1] The State made a motion in

---

[1] The first-degree burglary and first-degree robbery charges arise from the gun used to kill the victim. The State alleged that Massey and Harris had stolen it from Martha Davis about three weeks before the murder.

juvenile court for a declination of juvenile jurisdiction. Massey issued a subpoena to the prosecutor and moved to take the prosecutor's deposition to determine the basis for the motion. The juvenile court denied Massey's motion and quashed the subpoena.

In April 1987, the juvenile court held a declination hearing. Two psychologists testified that Massey had the mental age of a 9.9 year old, a borderline I.Q. of 77, and was considered a slow learner. Massey's reading, spelling, and arithmetic levels were also below average. Massey was considered passive, confirming and accommodating, but had a high anti-social tendency. Based on the testimony, the juvenile court declined jurisdiction, determining that the tests were unreliable because they were based solely on information provided by Massey, and that Massey may have a "secret garden"

within himself which harbors a very disturbed and dangerous individual.

The trial court severed Massey's superior court trial from Harris's trial. The trial court also severed the burglary and robbery charges.

Massey claimed that he was incompetent to stand trial. Upon the State's motion, the court compelled Massey to submit to an examination by a state psychologist to determine competency. After the hearing, the court determined that Massey was competent to stand trial.

Massey moved to suppress the statements he made to the two officers and to John Moore, who was both the Juvenile Program Coordinator and a family friend. The court found that Massey had knowingly, intelligently, and voluntarily waived his rights as to the statements made to the officers; however, the court suppressed the statements made to Moore

because Massey may have been confused as to Moore's status as either the Juvenile Program Coordinator or family friend.

At trial, Massey attempted to elicit testimony from Melody Anderson concerning a confession made by Harris while incarcerated. The trial court sustained the State's objection, concluding that the statement was untrustworthy. The trial court also excluded evidence of Harris's other crimes, wrongs or acts.

The jury convicted Massey of aggravated first-degree murder and he was sentenced to life imprisonment without the possibility of parole.

A. DECLINATION OF JUVENILE COURT JURISDICTION

Massey argues that the juvenile court erred in declining jurisdiction because he has a below average aptitude. We review the juvenile court's declination for abuse of discretion. See RCW 13.40.110 (2);

State v. [illegible]ey, 38 Wn. App. 831, 834, 690 P.2d 1175 (1984).

A juvenile has no constitutional right to be tried in juvenile court. State v. Hodges, 28 Wn. App. 902, 904, 626 P.2d 1025 (1981). However, the State bears the burden of showing that the declination of juvenile jurisdiction would be in the best interest of the child or the public, by a preponderance of the evidence. State v. Jacobson, 33 Wn. App. 529, 531, 656 P.2d 1103 (1982).

The juvenile court should consider eight criteria[2] before declining

---

[2] Those criteria are as follows:

1. The seriousness of the alleged offense to the community and whether the protection of the community requires waiver.
2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner.
3. Whether the alleged offense was against persons or against property, greater weight given to offenses against persons especially if personal injury

jurisdiction. Kent v. United States, 383 U.S. 541, 16 L. Ed. 2d 84, 86 S. Ct. 1045 (1966); State v. Holland, 98 Wn.2d 507, 515, 656 P.2d 1056 (1983). The eight criteria need not all be met; rather, they are to direct the court's inquiry. In re Burtts, 12 Wn. App. 564, 575, 530 P.2d 709 (1975).

Massey has failed to assign error to

---

resulted.

4. The prosecutive merit of the complaint.

. . .

6. The sophistication and maturity of the juvenile as determined by consideration of his home, environment, situation, emotional attitude and pattern of living.

7. The record and previous history of the juvenile.

8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile by the use of procedures, services and facilities currently available to the juvenile court.

Holland, 98 Wn.2d at 515.

any of the findings,[3] of the juvenile court when it declined jurisdiction. As a result, we will treat them as verities. See State v. Christian, 95 Wn.2d 655, 656, 628 P.2d 806 (1981).

The juvenile court considered Massey's age and maturity and determined that there was a prima facie case of aggravated first-degree murder, first-degree robbery and first-degree burglary. The court determined that the alleged offenses were aggressive, violent and premeditated or willful and committed against largely helpless people. Although the psychological and treatment reports recommended retention of juvenile jurisdiction, the court determined that those recommendations were predicated on

---

[3] Contrary to Massey's argument, the findings are sufficient for review.

unreliable information provided by Massey[4] and unsupported by substantial evidence.

Massey argues that his below average aptitude required the juvenile court to retain jurisdiction. However, Massey's mental ability is only one factor, which must be balanced against the other factors including the seriousness of the crime, the prospects for adequate protection of the public and the likelihood of reasonable rehabilitation. The juvenile court properly balanced those factors, and, therefore, its conclusion to decline jurisdiction was not an abuse of discretion.

Massey next argues that the prosecutor abused his discretion by

---

[4] Massey's psychological evaluation concluded that he was an unwitting and passive participant. However, the evaluation was predicated on Massey's own responses. Because Massey also had a high deception scale and anti-social tendencies, the court determined that the evaluations were not reliable.

implementing a mandatory policy of seeking a declination hearing in juvenile cases involving first-degree murder. In State v. Pettitt, 93 Wn.2d 288, 609 P.2d 1364 (1980), the Court determined that a "fixed formula which required a particular action in every case upon the happening of a specific series of events constitutes an abuse of the [prosecutor's] discretionary power . . ." (Emphasis in the original); Pettitt, 93 Wn.2d at 296. The trial court found that there was "no evidence that the prosecuting attorney abused its discretion in deciding to file a motion for declination." We review that finding for substantial evidence. State v. Billet, 52 Wn. App. 561, 563, 762 P.2d 350 (1988). The state offered evidence, that was admitted by the trial court, that a declination hearing was not sought by their office in a first-degree murder case involving a 12 1/2-year-old defendant. As

a result, there was substantial evidence supporting the finding that the prosecutor did not have a mandatory policy for seeking declination for first-degree murder.

Massey argues that the trial court erred in quashing his subpoena to take the prosecutor's deposition to determine the basis for the declination motion. We also review that decision for an abuse of discretion. State v. Hamilton, 24 Wn. App. 927, 935-936, 604 P.2d 1008 (1979). A defendant issuing a subpoena to a deputy prosecuting attorney must make an offer of proof showing that the testimony is necessary and is not privileged, repetitious, or cumulative, and that the testimony is relevant and material to the theory of the case. See State v. Stiltner, 61 Wn.2d 102, 377 P.2d 252 (1962), cert. denied 380 U.S. 924, 13 L. Ed. 2d 810, 85 S. Ct. 928 (1965). Massey

did not make an offer of proof setting forth what evidence would have been obtained from the prosecutor. As a result, the trial court did not abuse its discretion in quashing the subpoena.

B. PRE-TRIAL MATTERS

1. Reasonableness of the Investigative Stop

Massey argues that Officer Morrison illegally stopped and detained him. Massey filed a motion to exclude "any and all evidence obtained as a result of an illegal arrest of defendant." Clerk's Papers at 12. However, the record does not appear to contain any indication that Massey pursued the motion with further argument. Since Massey raised the issue but failed to pursue it, we deem the argument waived or abandoned. See State v. Valladares, 31 Wn. App. 63, 75-76, 639 P.2d 813 (1982) aff'd in part. rev'd in part, 99 Wn.2d 663, 664 P.2d 508 (1983)

(Although an issue of constitutional magnitude may be first raised on appeal pursuant to RAP 2.5 (a)(3), that right may be waived or abandoned by withdrawing the motion.)

Nevertheless, the ultimate test for an investigative stop is reasonableness, which involves balancing the degree to which the stop invades the personal liberty of the defendant against the public interest to be advanced. State v. Hobart, 94 Wn.2d 437, 443, 617 P.2d 429 (1980). Massey argues that witnesses described an adult, white, male and female as the victim's assailants, which is inconsistent with Massey's or Harris' description.

The canine track identified the alleged assailants' scent along the railroad tracks. The only route leading away from the tracks was the area of Union and Cormorant. Officer Morrison was then

stationed at that location, which is where she stopped the truck[5] containing Massey. Also, the vehicle contained a white male, consistent with the witness's statement. Those facts amount to a suspicion of criminal activity, and coupled with the minimal invasion of obtaining the occupants' identification, make the investigative stop lawful.

2. Compelled Competency Examination

Massey challenged his competency to understand the proceedings against him and to understand his constitutional rights. He offered the testimony of psychologists to support his claim. The State asked the trial court to require that Massey submit to a state psychological examination,

---

[5] Massey appears to argue that failure to stop the "beater" car that proceeded the truck makes the investigative stop arbitrary. However, Officer Morrison testified that she was unable to stop both vehicles so she chose the closest one. As a result, her decision was not arbitrary.

which the court ordered. Massey argues that being compelled to submit to a mental evaluation denied him of his Fifth Amendment privilege against self incrimination and his Sixth Amendment right to assistance of legal counsel since Massey's counsel was not allowed to object during the exam.

Massey has failed to provide any citation to the record that would indicate that the psychologist asked Massey any question that required an incriminating answer. Massey also fails to provide any citation to the record indicating that improperly obtained information was disclosed at trial. RAP 10.3 (a)(5) requires the parties to support their arguments with reference to the record. Having failed to satisfy that requirement, we find that Massey's constitutional rights were not violated.

3. Waiver of Fifth and Sixth

Amendment Rights

After Massey received his Miranda warnings, the juvenile advisement and an opportunity to have a parent present, he made a statement to Officer Morrison (the arresting officer) and Officer Hall (the transport officer). Massey argues that he did not knowingly, intelligently, and voluntarily waive his Fifth and Sixth Amendment rights. The trial court concluded that Massey understood each provision of his rights, but the court failed to enter written findings and conclusions pursuant to CrR 3.5(c). Although we need to know the basis for the trial court's ruling to perform an adequate review, we find sufficient

guidance in the oral opinion.[6]

The State has the burden of showing the waiver was knowing, voluntary and intelligent. State v. Ellison, 36 Wn. App. 564, 571, 676 P.2d 531 (1984). The test for waiver is a "totality of the circumstances" test. Dutil v. State, 93 Wn.2d 84, 87, 606 P.2d 269 (1980). The court should consider the defendant's age, experience, education, background, intelligence, his capacity to understand the warnings, the nature of the Fifth Amendment rights, and the consequences of waiving those rights. Fare v. Michael C., 442 U.S. 707, 725, 61 L. Ed. 2d 197, 99 S. Ct. 2560 (1979).

The statement made to the arresting

---

[6] When CrR 3.5 has not been observed, the appellate court may examine the record and make its own determination of voluntariness. State v. Hoyt, 29 Wn. App. 372, 379, 628 P.2d 515 (1981); State v. Vickers, 24 Wn. App. 843, 846, 604 P.2d 997 (1979).

officer was spontaneous, and not in response to a question. As such, it should be considered voluntary. State v. Ortiz, 104 Wn.2d 479, 484, 706 P.2d 1069 (1985). Although the recorded statement given to the transport officer was not spontaneous, but rather the product of custodial interrogation, it nevertheless was also voluntary, because Massey was not compelled to provide the information, even though he may have been influenced by the officer's position of authority. The fact that Officer Hall requested that Massey tell the truth is not of itself coercive.

The remaining question is whether the waiver was made intelligently. Massey argues that his low score on the aptitude tests, coupled with his age and passivity, make an intelligent waiver impossible. A mental subnormality does not automatically render a confession inadmissible, but it is considered a factor. Ortiz, 104 Wn.2d

at 484. The record indicates that Massey was aware of the serious nature of the crime and its consequences when he asked whether he would receive life in prison, and demonstrated some familiarity with a "mug book" and juvenile detention. Therefore, Massey made an intelligent waiver.

C. TRIAL ISSUES

1. Admissibility of Harris's Confession

Massey's accomplice, Harris, confessed to Melody Anderson that he killed Wang and that Massey was not involved. Massey attempted to have Anderson testify to Harris's confession to show Harris's intent that Massey share in his sentence and as hearsay for the truth of the matter asserted. Hearsay may be offered if it falls within one of the exceptions. ER 804 (b)(3) provides in pertinent part as follows:

> . . . A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

There are nine factors[7] by which a court determines trustworthiness. State

---

[7] Those factors are as follows:

1. Whether the declarant had an apparent motive to lie;
2. Whether the general character of the declarant suggests trustworthiness;
3. Whether more than one person heard the statements;
4. Whether the statements were made spontaneously;
5. Whether the timing of the statements and the relationship between the declarant and the witness suggest trustworthiness;
6. Whether the statements contain express assertions of past fact;
7. Whether cross examination could not help to show the declarant's lack of knowledge;
8. Whether the possibility of the declarant's recollection being faulty is remote; and
9. Whether the circumstances surrounding the statements give no reason to suppose that the declarant misrepresented the defendant's involvement.

v. Anderson, 107 Wn.2d 745, 750, 733 P.2d 517 (1987). The trial court considered those factors and concluded that the statements were not admissible because they went to Harris's state of mind, which is not in issue, that the statements were untrustworthy, and that Harris was bragging. We review that decision for an abuse of discretion. State v. Rowe, 77 Wn.2d 955, 957, 468 P.2d 1000 (1970).

There is evidence to indicate that Harris had a motive to lie because he wanted to impress a fellow inmate; Harris is not known for his general trustworthiness, and Harris had no reason to expect Anderson's complicity in revealing the statement, which gives more support to the bragging theory. As a result, the trial court did not abuse its discretion in considering the testimony untrustworthy and excluding it.

2. Admissibility of Harris's Other

Crimes, Wrongs or Acts

Massey sought to admit evidence of Harris's character to show that Harris committed the murder and that Massey was merely an innocent spectator, present only as a result of duress. ER 404 (b) provides as follows:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Admission of Harris's prior bad acts for the purpose of establishing a defense of duress is not supported by any of the listed exceptions. Therefore, the trial court did not abuse its discretion in excluding the evidence.

3. Admissibility of Expert Opinion Concerning Massey's Ability to

Waive his Constitutional Rights.

Massey argues that the trial court erred in not permitting his expert to testify at the suppression hearing to Massey's mental state and capacity on the date of the murder. ER 702 provides as follows:

> If scientific, technical, or other specialized knowledge <u>will assist the trier of fact</u> to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. (Emphasis added).

The trier of fact at the CrR 3.5 suppression hearing was the trial judge and not a jury. The judge, as the trier of fact, determined that the expert testimony would not assist him in rendering a decision and, therefore, did not abuse his discretion in excluding it.

D. POST-TRIAL ISSUES

1. Jury Selection System

Massey argues that this state's method of determining juror eligibility, which excludes 13 year-old juveniles, denies him of his constitutional right to a jury comprised of a fair cross-section of the community. A criminal defendant is entitled to a jury comprised of a fair cross-section of the community. Taylor v. Louisiana, 419 U.S. 522, 528, 42 L. Ed. 2d 690, 95 S. Ct. 692 (1975). In this state, the pool of jurors is collected from the election and tax rolls. RCW 2.36.070. As a result, juveniles are not allowed to serve as jurors. However, the U. S. Constitution does not forbid the states from prescribing relevant qualifications for their jurors, including age. Carter v. Jury Commission of Greene County, 396 U.S. 320, 332, 24 L. Ed. 2d 549, 559, 90 S. Ct. 518 (1970). Therefore, Massey had no right to have 13 year-old jurors and was not denied a jury comprised of a fair

cross section of the community.

2. Sufficiency of the Evidence

Massey argues that the evidence was insufficient to show premeditation. See State v. Bingham, 105 Wn.2d 820, 719 P.2d 109 (1986). In determining whether there is sufficient evidence as a matter of law to support the jury verdict this court must determine whether any rational trier of fact, weighing all the inferences in favor of the State, could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980). However, "[t]he planned presence of a weapon necessary to facilitate a killing has been held to be adequate evidence to allow the issue of premeditation to go to the jury." Bingham, 105 Wn.2d at 827. In this case, the evidence indicates that Massey had the gun prior to entering the marina. Therefore, sufficient evidence exists to

show premeditation.

3. Sentencing

Massey argues that his sentence of life imprisonment without the possibility of parole constitutes cruel and unusual punishment when applied to a 13 year old.[8] The test is whether in view of contemporary standards of elemental decency, the punishment is of such disproportionate character to the offense as to shock the general conscience and violate principles of fundamental fairness. Coker v. Georgia, 433 U.S. 584, 53 L. Ed. 2d 982, 97 S. Ct. 2861 (1977). That test does not embody an element or consideration of the defendant's age, only a balance between the crime and the sentence imposed. Therefore, there is no

---

[8] A sentence of life imprisonment without the possibility of parole imposed upon an adult for aggravated first degree murder is not cruel and unusual punishment. State v. Forrester, 21 Wn. App. 855, 587 P.2d 179 (1978).

cause to create a distinction between a juvenile and an adult who are sentenced to life without parole for first degree aggravated murder. Furthermore, the juvenile court's consideration at declination accounts for the disparity between juvenile and adult sentencing, and in this case the court elected for adult sentencing because the juvenile penalties were insufficient.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.060, it is so ordered.

/s/ WIELAND, J.P.T.

WE CONCUR:

/s/ ALEXANDER, C. J.

/s/ WORSWICK, J.

APPENDIX C

JUDGMENT AND SENTENCE of the Superior Court of the State of Washington for Pierce County: State of Washington, Plaintiff vs. Barry C. Massey, Defendant, No. 87-1-01354-7, SID NO. Not Available, 6-25-73 B/M, filed August 5, 1988

This court having conducted a sentencing hearing pursuant to RCW 9.94A.110 on August 3, 1988 upon defendant's conviction(s) of crime(s) set forth below and the court having heard from the parties and considered the presentence reports and the records and files herein, and otherwise being fully advised, now makes the following findings:

1. PARTIES PRESENT: Present at the sentencing hearing were the defendant, the defendant's attorney, JAMES BUCKLEY, Deputy Prosecuting Attorney THOMAS J. FELNAGLE, and _____

2. CURRENT OFFENSE(S): The defendant has been convicted of the following current offense(s) upon a conviction by jury, on

the 24th day of June, 1988.

Count I Crime: AGGRAVATED MURDER IN THE FIRST DEGREE

RCW: 9A.32.030(1)(a) & 10.95.020 (7)(9) Crime Code: _____

Date of Crime: 1/10/87

Incident Number: 87-00030

Special Finding: No

Count ___ Crime:_____

RCW: _____ Crime Code:_____

Date of Crime:_____

Incident Number:_____

Special Finding: _____

Count ___ Crime:_____

RCW: _____ Crime Code:_____

Date of Crime:_____

Incident Number:_____

Special Finding: _____

[ ] Additional current offenses attached as Appendix A.

This court has jurisdiction of the defendant and the subject matter. It is

ADJUDGED that the defendant is guilty of the current offenses set forth above.

The following group(s) of current offenses encompassed the same criminal conduct and should be counted as one crime in determining the offender score (RCW 9.94A.400(1)):_____

The following counts in the _____ information are hereby dismissed: _____

_____.

3. CRIMINAL HISTORY: This Court finds that the defendant has the following criminal history used in calculating the offender score pursuant to RCW 9.94A.360:

Sentencing Date Crime Date	Crime	Adult/Juvenile Crime Type
1. NONE KNOWN AT THIS TIME		

[ ] The defendant's criminal history is attached in Appendix B and incorporated by reference into this Judgment and Sentence.

4. SENTENCE DATA:

	OFFENDER SCORE	SERIOUSNESS LEVEL	RANGE	MAXIMUM TERM
Count I	0	XIV	life in prison without a chance of parol.	

[ ] Presumptive data score sheet (s) is attached as Appendix C and is incorporated by reference into this judgment.

5. SENTENCE ALTERNATIVE FINDINGS:

[ ] A. FIRST TIME OFFENSE: The defendant qualifies as a first-time offender pursuant to RCW 9.94A.120(5). The first-time offender waiver **is/is not** used in this sentence.

[ ] B. EXCEPTIONAL SENTENCE: Substantial and compelling reasons exist which justify a sentence **above/below** the standard range for count(s) _____. Findings of Fact and Conclusions of Law pursuant to RCW 9.94A.120(3) and Stipulations as to real and material facts, if any, are attached as Appendix D.

[ ] C. SPECIAL SEXUAL OFFENDER SENTENCING ALTERNATIVE: The defendant has been convicted of a felony sexual offense as specified in RCW 9.94A.120 (7)(a) and is eligible for use of the special sexual offender sentencing alternative. The defendant and the community **will/will not** benefit from use of the alternative.

[ ] D. SEXUAL OFFENDER TREATMENT PROGRAM: The defendant has been convicted of a felony sexual offense, does not qualify for the special sexual offender sentencing alternative, and is to be sentenced to a term of confinement of more than one year but less than six years. The defendant **shall/shall not** be ordered committed for evaluation for treatment pursuant to RCW 9.94A.120 (7)(b).

[ ] E. RESTITUTION: Based on information concerning restitution attached in Appendix E, the defendant is responsible for payment of restitution:

[ ] For offenses adjudicated herein pursuant to RCW 9.94A.140 (1).

[ ] For offenses which were not prosecuted and for which the defendant agreed to make restitution in a plea agreement, which is attached to Appendix E.

[ ] To be set by later order of court.

6. [ ] MONETARY PAYMENTS JUDGMENT AND SENTENCE: The defendant is ADJUDGED to be responsible for making monetary payments as stated below, within ten years, under the supervision of the Department of Corrections. The defendant is ORDERED to make the following monetary payments:

[ ] A. COSTS: Court costs in the amount of $_____

[X] B. VICTIM ASSESSMENT: Penalty assessment pursuant to RCW 7.68.035: $70.00

[ ] C. RESTITUTION: Restitution payments to: (subject to modification based on failure of co-defendants to pay): $_____

[ ] Restitution information attached in Appendix E -- total amount ordered: $_____

[ ] D. RECOUPMENT: Recoupment for defense attorney's fees of $_____

[ ] E. FINE: A monetary fine in the

amount of $_____

[ ] F. DRUG ENFORCEMENT FUND: Reimbursement in the amount of $_____

[ ] G. OTHER: Other costs in the amount of $_____

for _____

T $70.00

The above payments shall be made to the Pierce County Superior Court Clerk, 110 County-City Building, Tacoma, Washington 98402, and the Clerk of the Court shall credit monetary payments to the above obligations in the above listed order according to the rules of the clerk and according to the following terms:

_____

[ ] Terms to be set by defendant's Community Correction Officer.

Provided that no forfeiture proceedings are pending at the date of this order, bail or bond is exonerated.

(SENTENCE OVER ONE YEAR)

7. DETERMINATE JUDGMENT AND SENTENCE: The court having determined that no legal cause exists to show why a further judgment should not be pronounced, it is therefore ORDERED, ADJUDGED and DECREED

the defendant serve the determinate sentence and abide by the conditions set forth below.

The defendant is sentenced to a term of total confinement in the custody of the Department of Corrections for life without parole, months on Count I, _____ months on Count II, _____ months on Count III, with credit for time _____ days/months served prior to this date.

Credit for time since January 10, 1986 is not applicable for a life without possibility of parole sentence under RCW 10.95.

[ ] the terms in counts _____ are concurrent.

[ ] the terms in counts _____ are consecutive, for a total term of _____ months.

The following appendices are attached to this Judgment and Sentence and are incorporated by this reference:

[ ] Appendix A, Current Offenses
[ ] Appendix B, Current History
[ ] Appendix C, Sentence Scoring Worksheet(s)
[ ] Appendix D, Exceptional Sentence
[ ] Appendix E, Restitution

DONE IN OPEN COURT this 23rd day of August, 1988.

/s/ Donald H. Thompson
JUDGE

Presented By:

/s/
Deputy Prosecuting

Approved as to form:

Attorney for Defendant

APPENDIX D

ORDER DECLINING JURISDICTION OF JUVENILE COURT of the Superior Court of the State of Washington, Juvenile Court for Pierce County: State of Washington, Plaintiff vs. Barry Massey, Defendant, No. 182682 R010 and 182682 R020, filed April 15, 1987

This matter coming on to be heard upon the motion of the State of Washington to decline jurisdiction over the charges contained in the Information filed herein charging the defendant, Barry Massey, with one count of Aggravated Murder in the First Degree, No. 182682 R010, and one count of Robbery in the First Degree and one count of Burglary in the First Degree, No. 182682 R020, and the defendant appearing in court, represented by his counsel, James Buckley and Charles Herrmann, and the State being represented by Deputy Prosecuting Attorneys Stephen Gregorich and Thomas J. Felnagle, and the court having heard the evidence and argument of counsel, and being fully

advised in the premises, now makes the following:

FINDINGS OF FACT

I.

A prima facie case of the charges of Aggravated Murder in the First Degree, as charged in Information 182682 R010; Robbery in the First Degree and Burglary in the First Degree, as charged in Information 182682 R020, has been established.

II.

The protection of the community requires this court decline to exercise jurisdiction due to the seriousness of the alleged offenses which were committed in an aggressive, violent and premeditated or wilful manner against persons largely helpless to defend themselves.

III.

Whether the alleged offenses should be heard in one court by reason of the

juvenile's associates in the alleged offense being adults is not a criteria which applies in the instant case.

IV.

The defendant has no previous criminal record or history.

V.

The sophistication and maturity of the juvenile is age appropriate. He is not overly mature nor sophisticated beyond his years.

VI.

The court finds that substantial evidence establishes the defendant was an active participant in the crime. In light of the fact that the psychological and treatment recommendations were predicated on the defendant's account of his passive role in the crimes, the recommendation that the defendant be retained in the juvenile system is unsupported by substantial evidence. The time

constraints of the juvenile system do not permit consistent rehabilitation and do not therefore provide adequate time to rehabilitate and control the defendant consistent with society's right to protection.

CONCLUSIONS OF LAW

I.

The court has jurisdiction of the subject matter and parties of this action.

II.

Jurisdiction should be permanently declined by the Juvenile Court.

III.

Declination is in the best interest of both treatment needs of the juvenile and the protection of the people of the State of Washington. Kent v. United States, 383 U.S. 541, 566-67, 16 L. Ed. 2d 84, 86 S. Ct. 1045, 1060 (1966); State v. Holland, 98 Wn.2d 507, 515, 656 P.2d 1056 (1983); State v. Toomey, 38 Wn. App. 831,

834, 690 P.2d 1175 (1984).

ORDER

IT IS HEREBY ORDERED that the above entitled court does permanently decline jurisdiction, and that the photographs and fingerprints of the above named juvenile may be used or taken as are deemed advisable by the appropriate authorities in accordance with the law applicable to adults; that the juvenile may be placed in a lawful place of incarceration as may be directed by a law enforcement authority taking into account the fact that he has not yet reached his sixteenth (16) birthday.

IT IS FURTHER ORDERED that in all future criminal law violations the juvenile shall be proceeded on in accordance with the law applicable to adults pursuant to RCW 13.04.020(10).

IT IS FURTHER ORDERED that the Pierce County Sheriff is directed to carry out

this order.

DONE IN OPEN COURT this 13 day of April, 1987.

/s/ ARTHUR VERHAREN
J U D G E

Presented by:

/s/ CHRISTINE QUINN-BRINTNALL
CHRISTINE QUINN-BRINTNALL
Senior Deputy Prosecuting Attorney

/s/ THOMAS J. FELNAGLE
THOMAS J. FELNAGLE
Chief Criminal Deputy Prosecuting Attorney

/s/ STEPHEN GREGORICH
STEPHEN GREGORICH
Deputy Prosecuting Attorney

Approved as to Form:

/s/ JAMES BUCKLEY
JAMES BUCKLEY
Attorney for Defendant

CARL HERRMANN
Attorney for Defendant

crt